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10 Attorneys for BRIAN WAYNE WENDT

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13 IN THE UNITED STATES DISTRICT COURT
14
15 FOR THE NORTHERN DISTRICT OF CALIFORNIA
16
17 SAN FRANCISCO DIVISION

18 UNITED STATES OF AMERICA,

19 Plaintiff,

20 vs.

21 JONATHAN JOSEPH NELSON, et al.,

22 Defendants.

23 Case No. CR-17-00533-EMC

24 DECLARATION IN SUPPORT OF
25 WENDT DEFENSE (1) *IN LIMINE*
26 MOTION TO EXCLUDE EVIDENCE
27 TECHNICIAN OR FORENSIC
28 EXAMINER TESTIMONY RE
PROCESSING/TESTING OF FRESNO
CLUBHOUSE (F.R.E. 401, 402, 403);
(2) MOTION TO DETERMINE
WHETHER EVIDENCE OF
LUMINOL OR OTHER
PRESUMPTIVE TESTING SHOULD
BE EXCLUDED UNDER F.R.E. 702
AND 403 AND UNDER
DAUBERT/KUMHO TIRE AND RULE
16; REQUEST FOR JUDICIAL
NOTICE [EXHIBITS APPENDED TO
DECLARATION]

29 Date: February 24, 2021

30 Time: 10:00AM

31 Dept: The Honorable Edward M. Chen
32 District Judge

33
34 I, John T. Philipsborn, declare that:

35
36 DECLARATION IN SUPPORT OF WENDT (1) *IN LIMINE* MOTION TO EXCLUDE EVIDENCE
37 TECHNICIAN TESTIMONY RE PROCESSING OF FRESNO CLUBHOUSE; (2) MOTION TO
38 DETERMINE WHETHER EVIDENCE OF LUMINOL TESTING SHOULD BE EXCLUDED UNDER
39 F.R.E. 702 AND 403, UNDER *DAUBERT/KUMHO TIRE*, RULE 16; REQUEST FOR JUDICIAL NOTICE

1 1. Martín Sabelli and I represent Mr. Wendt in this case.

2 2. I prepared the pleadings to which this declaration pertains. Mr. Sabelli
3 assisted with the Memorandum of Points and Authorities.

4 3. In the motion, as well as in the supporting memorandum, I have made
5 mention of: discovery received from the Government; copies of FBI laboratory reports
6 sent to the defense on January 26, 2021, covered by a letter of that same date; case law;
7 and information about presumptive blood testing in the forensic setting. I believe that I
8 have correctly cited source materials in all of these categories and have accurately quoted
9 from those sources.

10 4. In making reference to literature in the forensic sciences addressing
11 presumptive blood testing, I have attempted to correctly characterize literature in a
12 variety of journals and reports on the forensic sciences that explains that there are
13 variables that will influence whether applying a chemical reagent or luminescent agent to
14 suspected blood evidence or locations in which blood may be found may produce false
15 positives. I believe that a variety of sources address these issues and caution against
16 reliance on presumptive blood testing at a crime scene to definitively identify human
17 blood.

18 5. I was counsel of record, along with Michael Burt, in the case that resulted
19 in one of the citations of an unpublished case dealing with presumptive blood testing,
20 *United States v. Fell*, 2015 LEXIS 82548; 2015 WL 3887151 (D.Vt, June 23, 2015).
21 While I did not conduct the evidentiary hearing that was involved in that case, I was
22 present for the testimony that led to the ruling by Chief Judge Crawford of the District of
23 Vermont. The significance of the ruling in the context of this case is to underscore, first,
24 that in several Federal Courts, evidence has been presented in *Daubert* litigations
25 involving motions to exclude serological evidence of the results of *presumptive* and
26 confirmatory blood testing. As discussed in the appended Memorandum, where no
27 confirmatory testing is available a number of courts (Federal and State) have excluded
28 the presumptive testing results. In the *Fell* and *McCluskey* cases that I have cited, the

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1 District Courts did receive information during *Daubert* hearings on the various Lab
 2 procedures involved in presumptive blood testing. Scientific evidence is involved in
 3 blood testing when there are resumptive and confirmatory or further tests, including
 4 serological tests; blood chemistry tests; and DNA testing involving blood evidence. The
 5 protocols in use by the FBI in laboratory settings call for an analyst to use certain specific
 6 procedures in using presumptive blood testing in an effort to identify blood. In *Fell*, as in
 7 other cases in which the use of presumptive blood testing in a laboratory setting was
 8 challenged, expert evidence was presented to assist the court in making its determination.

9 6. In this case, as demonstrated in Exhibit B appended here, which is an
 10 exhibit containing a segment of the Government's January 26, 2021 letter to defense
 11 counsel (I have omitted the first page so as to omit addresses and e-mail addresses). The
 12 Government discusses its desired proffer of evidence from evidence technicians who
 13 processed the Fresno Hells Angels clubhouse on November 20, 2017. Appended to that
 14 letter and transmitted with it was a series of reports, together with a CV pertinent to
 15 Amanda Bakker, who is proposed as a witness in this case to discuss among other things
 16 "...the difference between a presumptive test and a confirmatory test...." None of the
 17 information pertinent to Ms. Bakker's actual proposed testimony on these points is made
 18 available in the Government's disclosure. What is made available, however, is the result
 19 of Ms. Bakker's processing at the FBI laboratory of evidence taken from the Fresno
 20 clubhouse on November 20, 2017, and sent to the lab for processing. Ms. Bakker
 21 concluded that no blood evidence was indicated, and therefore no confirmatory or further
 22 testing was done on the items that I describe in the motion.

23 7. I believe I have accurately characterized the fact that in addition to there
 24 being no description of Ms. Bakker's opinions about the FBI's serological examination
 25 protocols and procedures or her opinions about presumptive and confirmatory blood
 26 testing, the Government has provided no information concerning the actual presumptive
 27 tests that are claimed to have been done by evidence technicians within the Fresno
 28 clubhouse on November 20, 2017, in addition to Luminol processing.

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1 8. The omissions just described appear to me to put the Government out of
2 compliance with Rule 16(a)(1)(F) and (G).

3 9. I am attaching some literature that pertains to Luminol testing, including an
4 article by Quickenden, et al., titled *A Study of Common Interferences with the Forensic*
5 *Luminol Test for Blood*. The actual citation can be seen in the article appended as
6 Exhibit C.

7 10. I am also appending a report of a study by DiCarlo, et al., titled *A*
8 *Quantitative Evaluation of the Effect Cleaning Products Have on the Bluestar Test for*
9 *Latent Blood*. The citation for that article appears on the face of the article. Bluestar is a
10 brand name for a type of Luminol that is addressed in case law that I have cited to the
11 Court in the accompanying papers.

12 11. I do not believe that the Government's proposal to have evidence
13 technicians testify about the observed reaction of a chemical agent or reagent or
14 luminescent agent applied in various parts of a suspected crime scene with descriptions of
15 the observed reaction and explanations of it qualifies as non-expert lay testimony under
16 any reasonable reading both of the law and of the proposed testimony.

17 12. I believe it is incumbent on the Government to provide further information
18 about the actual testing done and about the FBI's applicable laboratory protocols if the
19 Government is going to go forward with its proposed testimony as explained in the
20 contents of Exhibit B, the January 26, 2021 transmission to defense counsel.

21 I declare under penalty of perjury that the foregoing is true and correct, except as
22 to those matters alleged on information and belief, and as to those matters, I believe this
23 declaration to be true and accurate.

24 Executed this 3rd day of February, 2021, at San Francisco, California.

25

26

/s/ John T. Philipsborn

27 Declarant

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PROOF OF SERVICE

I, Melissa Stern, declare:

That I am over the age of 18, employed in the County of San Francisco, California, and not a party to the within action; my business address is Suite 350, 507 Polk Street, San Francisco, California 94102.

On February 3, 2021, I served the within document entitled:

**DECLARATION IN SUPPORT OF WENDT DEFENSE(1) IN LIMINE
MOTION TO EXCLUDE EVIDENCE TECHNICIAN OR FORENSIC
EXAMINER TESTIMONY RE PROCESSING/TESTING OF FRESNO
CLUBHOUSE (F.R.E. 401, 402, 403); (2) MOTION TO DETERMINE
WHETHER EVIDENCE OF LUMINOL OR OTHER PRESUMPTIVE
TESTING SHOULD BE EXCLUDED UNDER F.R.E. 702 AND 403 AND
UNDER DAUBERT/KUMHO TIRE AND RULE 16; REQUEST FOR
JUDICIAL NOTICE [EXHIBITS APPENDED TO DECLARATION]**

- () By placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Francisco, CA, addressed as set forth below;
- (X) By electronically transmitting a true copy thereof through the Court's ECF system;
- () By having a messenger personally deliver a true copy thereof to the person and/or office of the person at the address set forth below.

AUSA Kevin Barry
AUSA Ajay Krishnamurthy
AUSA Lina Peng

All defense counsel through ECF

Executed this 3rd day of February, 2021, at San Francisco, California.

Signed: /s/ *Melissa Stern*
Melissa Stern

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